STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 1999
v	No. 209413 Kent Circuit Court
STEPHEN PAUL MERCER, Defendant-Appellant.	LC No. 97-005332 FC

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of second degree murder, MCL 750.317; MSA 28.549. The trial court sentenced him to 25 to 50 years' imprisonment. We affirm.

Defendant first argues that the trial court should have granted his motion for a new trial based on the court's refusal at trial to allow defense counsel to ask a follow-up question after the prosecutor's recross examination of a defense witness. We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, could find no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant argues that a follow-up question was necessary after the prosecutor's recross examination to reinforce the witness' testimony that defendant did not intend to kill the victim. The witness testified on direct examination that at the time of the killing defendant "would have had [a] difficult time . . . actually form[ing] intention or intent to do what he was doing . . . ." The witness also testified on direct examination that he saw no indication that defendant intended to kill the victim, and on recross examination he again testified that defendant did not intend to kill the victim. MCL 768.29; MSA 28.1052 states that the trial judge is to "limit the introduction of evidence . . . to relevant and material matters, with a view toward the *expeditious* . . . ascertainment of the truth . . . . (emphasis added)." MRE 611(a) states that the "court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to . . . avoid needless consumption of time . . . ." Here, because additional testimony regarding defendant's intent would have been cumulative and would have

needlessly wasted time, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the refusal to allow the additional testimony.

Next, defendant argues that the trial court erred by refusing to instruct the jury on the defense of insanity. This Court reviews jury instructions as a whole to determine if they fairly presented the issues to the jury. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must not exclude a material defense or theory if there is evidence to support it. *Id*. An insanity instruction is warranted only if a defendant presents evidence to rebut the presumption of sanity; the mere assertion of an insanity defense does not mandate that the instruction be given. *People v VanDiver*, 79 Mich App 539, 541; 261 NW2d 78 (1977); *People v Livingston*, 57 Mich App 726, 732; 226 NW2d 704 (1975), remanded on other grounds 396 Mich 818 (1976).

Michigan law deems one legally insane if, "as a result of mental illness . . . [the] person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1); MSA 28.1044(1)(1). Defendant argues that based on the evidence introduced at trial, the jurors "could have concluded that [he] suffered from a substantial disorder of thought or mood [that] significantly impaired his ability to cope with the ordinary demands of life." Even if defendant is correct in arguing that the jurors could have reached this conclusion, such a conclusion would not have warranted an insanity instruction, since there was no evidence that defendant "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1); MSA 28.1044(1)(1). Indeed, defendant's own psychological witness testified (1) that defendant could have refrained from killing the victim if a policeman had been in the room at the time, (2) that defendant felt guilt over the killing, and (3) that guilt is evidence that a person can appreciate the nature and wrongfulness of his actions. Moreover, the prosecutor's psychological witness testified that defendant told him that "I knew as soon as I grabbed [the victim's] throat [that] it was wrong, but I just snapped [and] didn't really care." In light of this testimony, and because defendant presented no evidence that he met the definition of legal insanity, the trial court did not err by refusing to instruct the jury on this defense. *People v Savoie (After Remand)*, 419 Mich 118, 126-130; 349 NW2d 139 (1984).

Finally, defendant argues that the trial court imposed a disproportionately long sentence. We review a trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which mandates that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Here, because defendant's sentence fell within the sentencing guidelines' recommended range, it was presumptively proportionate. *People v Moseler*, 202 Mich App 296, 300; 508 NW2d 192 (1993). If unusual circumstances existed, however, it could have nonetheless violated the principle of proportionality. *Milbourn, supra* at 661. In *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992), the Court defined "unusual" in this context as "[u]ncommon, not usual, [or] rare."

Defendant argues that his case presented unusual circumstances because he (1) had a troubled upbringing, (2) was mentally and emotionally unstable, (3) had no criminal history, (4) would not have been prosecuted if he had not confessed, and (5) expressed remorse. We first note that that this Court has already held that a lack of criminal history is not an unusual circumstance that can overcome the presumption of proportionality. *Daniel*, *supra* at 54. We further conclude that a confession or admission, a troubled upbringing, remorse, and mental and emotional instability are not particularly rare in felony cases, either individually or collectively. Accordingly, defendant's sentence did not violate the principle of proportionality, especially since defendant heartlessly, by strangulation, took the life of a frail, elderly woman who had befriended him.

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter

Markman, J. did not participate